Supreme Court, U.S.
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No. 00-192

In The

Supreme Court of the United States

RUBEN HUGHES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the petitioner, sentenced to life imprisonment under the United States Sentencing Guidelines, deprived of due process and the right to a jury trial when the facts giving rise to the sentence were not particularly found beyond a reasonable doubt by a jury, but rather were found by a judge using a preponderance of the evidence standard?

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PRAYER

Petitioner Ruben Hughes respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Seventh Circuit's opinion affirming the petitioner's conviction and sentence is published at 213 F.3d 323, and is attached hereto in Appendix A.

JURISDICTION

The Seventh Circuit entered judgment affirming the petitioner's conviction and sentence on May 3, 2000. This petition is timely in that it is filed within 90 days of that judgment. This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation.

STATEMENT OF THE CASE

1. A six count superseding indictment charged Petitioner Ruben Hughes with various drug offenses, and being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). Specifically, Count One alleged that Hughes conspired to possess cocaine and cocaine base with intent to distribute in violation of 21 U.S.C. § 846. Count Two charged Hughes with delivering 101.6 and 125 grams of cocaine base to an informant on January 30, 1997 and June 17, 1997, respectively. Counts Three and Four alleged that Hughes delivered 13.5 and 127 grams of powder cocaine to an informant on January 31, 1997 and February 25, 1997, respectively. Count Six contained the weapons charge.

Hughes went to trial alone, while his co-defendants cooperated and testified for the government. The evidence at trial showed that during the period of the charged conspiracy, Hughes and Co-Defendant Joseph Nixon delivered a total of 369.8 grams of cocaine to Kendell Woods, an undercover government informant. In addition, the government introduced evidence relating to Hughes' alleged cocaine dealing occurring outside the time-frame of the charged conspiracy.

The jury instructions did not require the jury to determine the amount of cocaine involved in the conspiracy, or as part of uncharged conduct. Nor was the jury asked to resolve whether Hughes acted as a leader or an organizer of criminal activity involving five or more participants. *See* U.S.S.G. § 3B1.1(a). The jury returned general verdicts of guilty on all counts.

At the sentencing hearing, Hughes objected to proposed sentencing guideline enhancements recommended in a presentence investigation report ("PSR"). Hughes, however, did not prevail. After making factual findings to support certain sentencing guideline enhancements, the district court sentenced Hughes to life imprisonment.

Hughes fared no better on appeal. While Hughes again objected to the application of certain sentencing guideline enhancements, the Seventh Circuit affirmed Hughes' sentence in all respects. *United States v. Hughes*, 213 F.3d 323 (7th Cir. 2000); App. A.

2. Among the sentencing guideline objections raised by Hughes was an objection to the quantity of crack and powder cocaine involved in the offense. Despite the fact that Hughes and his co-defendant only delivered a total of 369.8 grams of crack and powder cocaine during the period of the charged conspiracy, the PSR stated that "the amount of drugs the defendant was found guilty of conspiring to distribute was 1.5 kilograms of cocaine base." PSR at p. 9, ¶ 28. The PSR, therefore, recommended that Hughes' base offense level be set at Level 38 (numerically, the highest in the Drug Quantity Table) for the amount of drugs involved in the offense. *See* U.S.S.G. § 2D1.1(c)(1).

The trial court sided with the government and the probation officer on the drug quantity issue. After the prosecutor argued that the evidence at trial "establishes a crack cocaine well in excess of 1.5 kilograms," the district court entered the following factual finding: "That is my recollection of the evidence in the case. There being, actually, no evidence to the contrary, the Court finds that there is at least 1.5 kilograms of cocaine base involved, which leads to a Level 38."[1] 1/13/99 Tr. 13-14.

On appeal, the Seventh Circuit observed that it only reviews a district court's drug quantity findings for clear error, and found that the evidence amply supported the district court's factual findings regarding drug quantity. *Hughes*, 213 F.3d at 234; App. A-21-24.

3. At the sentencing hearing, Hughes also objected to the imposition of a four-level upward adjustment for leadership role, U.S.S.G. § 3B1.1(a). R. 78; 1/13/99 Tr. 19-22. After the government argued that the trial evidence showed that Hughes had subordinates in his drug business, the trial judge ruled: "Well, the evidence, I think, was even further than that. That there was a lot of people who distributed for resale. So, I am going to find that he was the organizer and unquestioned leader of the organization, requiring a four level enhancement." 1/13/99 Tr. 21.

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[1] The district judge did not make any other oral findings regarding the drug amount, distinguish between quantities relating to cocaine base and powder cocaine (a significant point given the disparity of punishments under the sentencing guidelines between crack versus powder cocaine), or enter a written statement of reasons for the sentence.

On appeal, the Seventh Circuit noted that it only reviews a district court's determination regarding a role in the offense upward adjustment for clear error. *Hughes*, 213 F.3d at 235; App. A-24. The court of appeals affirmed the district court's factual finding that Hughes exercised a leadership role in criminal activity involving five or more participants, commenting:

> In light of our deference to the sentencing judge on factual and credibility issues . . . we conclude that the judge's findings supporting the upward adjustment of Hughes' offense level for his leadership role in the crimes were not clearly erroneous.

Id., App. A-25 (citation omitted).

REASONS FOR GRANTING THE PETITION

Petitioner Ruben Hughes has been ordered to spend the rest of his natural life in a federal prison. The jury's verdict did not mandate this result, for the jury did not make any express findings (based upon proof beyond a reasonable doubt) regarding the amount of drugs involved in the offense of conviction, or Hughes' leadership role in the offense. Rather, Hughes' draconian sentence has been affirmed on the basis of a judge's factual findings made under the preponderance of the evidence standard.[2]

[2] The Seventh Circuit has long required district courts to employ a preponderance of the evidence standard at sentencing, *e.g.*, *United States v. White*, 888 F.2d 490, 499 (7th Cir.

qualified pension benefits as "disposable income" under such an analysis. Petitioners contend that such a classification is improper as a matter of law.

Petitioners' ERISA-qualified benefits cannot be alienated for the benefit of creditors. This is true regardless of their involvement in a bankruptcy case. *Patterson v. Shumate,* 504 U.S. 753, 764 (1992), *citing Butner v. United States,* 440 U.S. 48, 55 (1979); *Lewis v. Manufacturers Nat'l* Bank, 364 U.S. 603, 609 (1961); *and Guidry v. Sheet Metal Workers Pension Fund,* 493 U.S. 365 (1990); *see generally* 29 U.S.C. § 1056(d)(1) . Petitioners' ERISA-qualified plan benefits cannot be alienated for the benefit of creditors through the bankruptcy process, whether they filed a Chapter 7 case (which they did) or a Chapter 13 case (which they did not). The "hypothetical" Chapter 13 analysis conducted by the courts below, which classified Petitioners' ERISA-qualified benefits as "disposable income" subject to distribution to satisfy the claims of creditors (and all Chapter 13 plan payments are, even in a hypothetical world, remitted to creditors), is very real, very reversible, error.

ARGUMENT FOR GRANTING WRIT

The issues here arise from the interaction of two significant federal statutes: The Bankruptcy Code (specifically 11 U.S.C. § 707(b)) and ERISA (specifically, 29 U.S.C. § 1056(d)). As recently as 1992, this Court addressed the interplay between the Bankruptcy Code and ERISA's anti-alienation provisions in a written opinion. *See, e.g., Patterson*. The narrow issue of whether ERISA-Qualified Pension Plan benefits constitute "disposable income" distributable to creditors under a "hypothetical Chapter 13 plan" analysis conducted pursuant to 11 U.S.C. § 707(b) is an

important question of federal law that has not yet been settled by this Court.

The published decision of the ~~Eighth Circuit~~ Court of Appeals[5] conflicts in principle with, and undermines the precedential value of, the Supreme Court opinions issued in *Guidry* and *Patterson*. The resolution of the issues presented here will have a direct impact on the rights and financial affairs of individuals across the country who receive ERISA-qualified benefits, but are experiencing financial difficulties at a level sufficient to cause them to contemplate seeking bankruptcy relief. This Court should resolve the issue of first impression presented here. The need for clear judicial guidance from this Court is acute.

ARGUMENT 1

THE COURTS BELOW ERRED IN HOLDING THAT PAYMENTS FROM THE PETITIONERS' ERISA-QUALIFIED PENSION PLAN CONSTITUTE "DISPOSABLE INCOME" DISTRIBUTABLE TO CREDITORS WHEN CONDUCTING A "HYPOTHETICAL CHAPTER 13 PLAN" ANALYSIS PURSUANT TO 11 U.S.C. § 707(b).

A. ERISA Unequivocally Prohibits the Alienation of Petitioners' Pension Benefits for the Benefit of Creditors.

The pension benefits at issue here are paid to Petitioners from the ERISA-qualified Deere & Co. Pension

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[5] 212 F.3d 395; *see* App. A at 1a - 5a.

Plan.[6] ERISA contains an anti-alienation provision which, without exception, precludes creditors from gaining any access to benefits paid from qualified plans to plan participants. *See generally* 29 U.S.C. § 1056(d)(1); *Patterson,* 504 U.S. at 764, *citing Guidry*.

B. There is no Bankruptcy Exception to ERISA's Prohibition Against the Alienation of Benefits Paid to Plan Participants from ERISA-qualified Plans.

This Court has specifically refused to create a bankruptcy exception to ERISA's prohibition against the alienation of benefits paid to plan participants from ERISA-qualified plans. *See Patterson*, 504 U.S. at 764. Quoting the *Patterson* Court:

> First, our decision today ensures that the treatment of pension benefits will not vary based on the beneficiary's bankruptcy status. *See Butner v. United States*, 440 U.S. 48 (1978) (observing that "[u]niform treatment of property interests" prevents "a party from 'receiving a windfall merely by reason of the happenstance of bankruptcy,'" quoting *Lewis v. Manufacturers National Bank,* 364 U.S. 603, 609 (1961)). We previously have declined to recognize any exceptions to ERISA's anti-

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[6] The parties have stipulated that the pension benefits at issue here are paid to Petitioners from the Deere & Company pension plan, which is an ERISA-qualified plan. App. B at 7a - 8a.

> alienation provision *outside* the bankruptcy context. *See Guidry v. Sheet Metal Workers Nat. Pension Fund,* 493 U.S. 365 (1990) (labor union may not impose constructive trust on pension benefits of union official who breached fiduciary duties and embezzled funds). Declining to recognize any exceptions to that provision *within* the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds. (citation omitted).

Patterson at 764 (emphasis in original).

The language from this Court's *Patterson* decision could not be more clear. Benefits paid to plan participants from ERISA-qualified plans (including the plan payments received by the Petitioners) are not subject to alienation for the benefit of creditors in bankruptcy proceedings as a matter of law. *Id.* Under this Court's decision in *Patterson*, the Petitioners' Deere & Co. ERISA-qualified Pension Plan payments are not subject to distribution to creditors in this or any other bankruptcy case, as "disposable income" or otherwise, whether the bankruptcy case is real or "hypothetical." *Id.*

C. Since There is No Bankruptcy Exception to ERISA's Prohibition Against the Alienation of Benefits Paid to Plan Participants from ERISA-Qualified Plans, the Courts Below Erred in Classifying Petitioners' ERISA-Qualified Plan Payments as "Disposable Income" Subject to Distribution to Creditors in a " Hypothetical" Chapter 13 Bankruptcy Case.

Petitioners qualify as Chapter 7 debtors, and filed their voluntary bankruptcy petition pursuant to Chapter 7 (***not Chapter 13***) of the Bankruptcy Code. *See generally* 11 U.S.C. §§ 109 and 701, *et seq*. The administration of the Petitioners' no-asset bankruptcy estate is governed by the provisions of Chapter 7 (***not Chapter 13***) of the Bankruptcy Code. Petitioners' Deere & Co. Pension Plan payments are not subject to distribution to creditors in this no-asset Chapter 7 case as a matter of law. *See Patterson*, 504 U.S. at 764. The crux of the issue here is whether granting Petitioners a bankruptcy discharge (at age 60+) in their no-asset Chapter 7 bankruptcy case (in which neither creditors nor the panel trustee have objected to exemptions or discharge) is a "substantial abuse" of the Bankruptcy Code, warranting dismissal under 11 U.S.C. § 707(b). Dismissal was not, and is not, appropriate here.

The sole statutory premise of Respondent's Motion to Dismiss Petitioner's bankruptcy case, sustained by the courts below, is 11 U.S.C. §707(b). That section provides, in pertinent part:

§707. Dismissal.

. . .

(b) after notice and a hearing, the Court, on its own motion or on a motion by the United States Trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual under this Chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this Chapter. There shall be a presumption in favor of granting the relief requested by the Debtor.

. . . .

The text of 11 U.S.C. § 707(b) ***does not*** define the term "substantial abuse", ***nor does it incorporate Bankruptcy Code provisions outside the scope of Chapter 7, either by reference or by implication. There is no language in the text of 11 U.S.C. § 707(b), or anywhere else in Chapter 7 of the Bankruptcy Code, which compels federal courts to engage in a "hypothetical Chapter 13 analysis" for purposes of determining whether a particular case constitutes a "substantial abuse."***

Faced with having to divine the meaning of the undefined term "substantial abuse" in the text of 11 U.S.C. § 707(b), the Eighth Circuit Court of Appeals adopted a "hypothetical Chapter 13 analysis" to determine whether a Chapter 7 case is subject to dismissal pursuant to that section. *See, e.g., In re Koch,* 109 F.3d 1285 (8th Cir. 1997); *Fonder v. United States,* 974 F.2d 996 (8th Cir. 1992); *United States Trustee v. Harris*, 960 F.2d 74 (8th Cir. 1992); *In re Walton,* 866 F.2d 981 (8th Cir. 1989). The Eighth Circuit has, in that context, "held that a Chapter 7 debtor's ability to fund a

Chapter 13 plan 'is the primary factor to be considered in determining whether granting relief would be a substantial abuse.'" *Koch,* at 1286, *citing Walton* at 984-85.

In their analysis under 11 U.S.C. § 707(b), the Courts below held that the Petitioners' ERISA-qualified pension income was "disposable income" distributable to creditors in a "hypothetical Chapter 13 plan," effectively ignoring ERISA's prohibition against the alienation of benefits paid to participants from ERISA-qualified plans. *See* App. A, pp. 4a-5a; App. B, pp. 9a-12a. The District Court mischaracterized the Petitioners' position as being premised upon the ***exempt status*** of their ERISA-qualified pension benefits (i.e., as opposed to being protected from alienation under *Patterson* and ERISA's anti-alienation provision at 29 U.S.C. § 1056(d)(1)). App. B at 10a-11a. The courts below also advanced "bankruptcy policy" grounds in support of dismissal. App. B at p. 9a; App. A at pp. 4a-5a. The legal analysis evident from the lower courts' written decisions, and also their reliance on "bankruptcy policy" as grounds for dismissal of the Petitioners' case pursuant to 11 U.S.C. § 707(b), constitutes reversible error.

1. In Conducting Their "Hypothetical Chapter 13 Analysis," the Courts Below Erroneously Assumed That All Income Received by a Chapter 7 Debtor, Without Exception, is Subject to Distribution to Creditors in a Chapter 13 case.

The lower courts held that ***all income received by a debtor, without exception***, must be considered disposable income distributable to creditors in a "hypothetical Chapter 13

analysis" under 11 U.S.C. § 707(b).[7] *See* App. B at 9a-12a; App A at 3a-5a.

The District Court failed to directly address the Petitioners' position with respect to their ERISA-qualified plan benefits (i.e., that the plan benefits are not subject to

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[7] Assuming without in any manner conceding that the provisions of Chapter 13 of the Bankruptcy Code have some relevance to the administration of this ***no-asset Chapter 7 case***, it is significant that a "disposable income test" ***is NOT*** essential to the confirmation of every Chapter 13 plan.

Under the plain language of 11 U.S.C. § 1325, in the absence of an objection by the trustee or the holder of an allowed unsecured claim, a bankruptcy court "shall confirm a Chapter 13 Plan" if the proposed plan meets the requirements of 11 U.S.C. § 1325(a), without reference to disposable income test of 11 U.S.C. § 1325(b)(1)(B). *See generally,* 11 U.S.C. § 1325(a) *and* (b)(1)(b). The disposable income test of 11 U.S.C. § 1325(b)(1)(B) becomes relevant only if a Chapter 13 trustee or holder of an allowed unsecured claim objects to confirmation of the proposed Chapter 13 plan. *See generally,* 11 U.S.C. §§ 1325(a) *and* (b)(1)(b).

Here, no creditors appeared in the Petitioners' no-asset case, and the trustee filed a no-asset case report, not an objection to any plan (as no plan is required in a Chapter 7 case). There is no basis in the record to suggest that the facts which are conditions precedent to a "disposable income" analysis under 11 U.S.C. § 1325(a) and (b) are present. Nor is there any statutory authority requiring resort to the provisions of Chapter 13 in the administration of the Petitioners' Chapter 7 bankruptcy case. The same concerns expressed by Justice Scalia in his concurring opinion in *Patterson* are present here. *Patterson*, 504 U.S. at 766-67 (Scalia, J., concurring).

alienation under *Patterson* and its interpretation of 29 U.S.C. § 1056(d)(1)). The District Court's legal analysis was instead comprised of analogies to cases where various non-ERISA benefits, exempt from creditor claims ***under state and federal law other than ERISA***, were held to be includable as "disposable income" under a "hypothetical Chapter 13 analysis":

> The Taylors argue that the anti-alienation provision contained in ERISA § 206(d)(1) prevents any income from the plan from being considered when determining disposable income. . . . The Taylors rely heavily on the Supreme Court's interpretation of the ERISA anti-alienation clause in *Patterson v. Shumate*, 504 U.S. 753 (1992). The *Patterson* Court found that the anti-alienation provision of § 206(d)(1) constituted a restriction on transfer enforceable under "applicable nonbankruptcy law" as provided in 11 U.S.C. § 541(c)(2) of the Bankruptcy Code, and accordingly, a debtor could exclude his interest in such a plan from property of the bankruptcy estate. *See Patterson*, 504 U.S. at 755. However, this Court does not find *Patterson* dispositive of the instant case. ***Although pension benefits may be exempt property, a debtor's ability to claim an exemption is an independent issue from whether the debtor has the ability to repay his or her debts.*** (Citations omitted).

App. B at 10a (emphasis added). Petitioners do not base their position upon state or federal exemption statutes. Petitioners base their position upon the anti-alienation provisions of ERISA, and specifically 29 U.S.C. § 1056(d)(1).

The Court of Appeals likewise mischaracterized Petitioners' arguments as a claim that the ERISA-qualified benefits at issue were "exempt from creditors." App. A, p. 4a. The Court of Appeals also plainly ignored the anti-alienation provisions of ERISA, and relied exclusively upon the provisions of ***Chapter 13*** of the Bankruptcy Code in upholding the dismissal of Petitioners' no-asset ***Chapter 7*** bankruptcy case:

> The fact that a pension is exempt from the reach of creditors does not preclude a bankruptcy court from finding that the pension plan is also disposable income for purposes of Chapter 13. The question of whether income from a pension is exempt from creditors is a wholly independent inquiry from the question of whether the pension income is reasonably necessary to support the debtor. *See In re Morse,* 164 B.R. 651, 656 (Bankr. E.D. Wash 1994). The latter question is the pertinent inquiry for purposes of Chapter 13. *See Koch,* 109 F.3d at 1289. In regard to the former question, we note that ***nothing in the language of Chapter 13 prevents the funding of a Chapter 13 plan with exempt income.***[8] *See id.; In re Hagel,* 184 B.R. 793, 798 (B.A.P.

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[8] While that may be true with respect to the provisions of Chapter 13 of the Bankruptcy Code, *Patterson* and *Guidry* clearly establish that ***ERISA*** prohibits the alienation of qualified plan payments for the benefit of creditors. 29 U.S.C. § 1056(d)(1). Without question, creditors receive Chapter 13 plan payments. Moreover, there is no statutory basis for the Court of Appeals' reference to Chapter 13 bankruptcy principles in connection with the administration of the Petitioners' Chapter 7 bankruptcy case.

> 9th Cir. 1995). ***Hence the question of whether a pension plan is exempt or otherwise restricted by a federal anti-alienation provision is irrelevant in a Chapter 13 context.***

App. A at 4a-5a (emphasis added).

Petitioners recognize that the Court of Appeals has held that certain payments *which are exempt from creditor claims under state or non-ERISA federal law,* such as tax refunds, social security benefits, workers compensation benefits, personal injury recoveries, and unemployment benefits are includable as "disposable income" distributable to creditors in the "hypothetical Chapter 13 analysis" under 11 U.S.C. § 707(b). *See, e.g., Koch* (citing cases). It is equally true, however, that those cases do not address, and the Supreme Court ***has not*** squarely addressed, the very narrow issue presented on the specific, stipulated facts of this case: Whether ERISA's anti-alienation provisions operate to exclude pension payments received by participants in ERISA-qualified plans from "disposable income" payable to creditors under a "hypothetical Chapter 13 plan analysis" pursuant to 11 U.S.C. § 707(b).

This Court ***has***, however, held that ***there is no bankruptcy exception*** to ERISA's prohibition against the alienation of benefits paid to plan participants from ERISA-qualified plans. *See Patterson,* 504 U.S. at 764. By failing to properly recognize and apply ERISA's anti-alienation provisions in its "hypothetical Chapter 13" analysis, and reaching the related legal conclusion that the Petitioners' ERISA-qualified pension benefits would be "disposable income" distributable to creditors in a "hypothetical Chapter 13" case, ***the courts below effectively created a***

"hypothetical Chapter 13 analysis exception" to ERISA's anti-alienation provision! In doing so, the lower courts acted in a manner wholly inconsistent with the Supreme Court's mandate in *Patterson* that no exceptions to the anti-alienation provisions of ERISA exist, inside or outside of bankruptcy. *See Patterson*, 504 U.S. at 764.

Inclusion of Petitioners' ERISA-qualified pension benefits as "disposable income" distributable to creditors in a "hypothetical Chapter 13 plan" analysis under 11 U.S.C. § 707(b) is the analytical equivalent of the "strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible [ERISA-qualified] funds" prohibited by the *Patterson* decision. *Id.* Under the particular facts of this case, the decisions of the courts below constitute reversible error.

2. The Courts Below Also Committed Reversible Error in Relying Upon "Bankruptcy Policy" in Sustaining the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. § 707(b).

The District Court made passing reference to policy considerations in its affirmance of the Bankruptcy Court:

> The Eighth Circuit has commented "[w]ith the enactment of [11 U.S.C. § 707(b)], debtors no longer have unfettered access to voluntary Chapter 7 relief." *In re Walton*, 866 F.2d 981, 982 (8th Cir. 1989). Section 707(b) is "aimed primarily at stemming the use of Chapter 7 relief by unneedy debtors." *Id.* at

983 (citing S. Rep. No. 65, 98th Cong., 1st Sess. 3 (1983)).

App. B at 9a.

Like the legal analysis employed by the courts below, such "bankruptcy policy" concerns are inconsistent with the Supreme Court's holding in *Patterson*. In rejecting "bankruptcy policy" arguments like those advanced by the District Court here, the *Patterson* Court stated:

> Section 206(d) [29 U.S.C. § 1056(d)] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are blameless), ***even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.***

Patterson, 504 U.S. at 765, *quoting Guidry* (emphasis added). The analysis found in the *Patterson* case set forth above applies with equal, if not greater, force in the present context. In *Patterson*, this Court found that the policies underlying ERISA's anti-alienation provisions were paramount to "the Bankruptcy Code's policy of ensuring a broad inclusion of assets in the bankruptcy estate." *See Patterson*. The Eighth Circuit Court of Appeals has, in other cases, also acknowledged that the policy of protecting ERISA-qualified pension benefits is paramount to "bankruptcy policy" arguments like those relied upon by the lower courts here. *See Whetzal v. Anderson*, 32 F.3d 1302, 1304 (8th Cir. 1994) (in *Shumate*, "the Court emphasized its view that the more important policy is protecting pension benefits.").

The courts below erroneously employed a policy analysis deeming the bankruptcy policies underpinning 11 U.S.C. § 707(b) to be paramount to the policies advanced by ERISA's anti-alienation provision: protection of pension benefits. This policy conclusion is wholly inconsistent with the policy analysis set forth by both the United States Supreme Court in *Patterson,* and even the Court of Appeals in its own opinion in *Whetzal.* The lower courts' "policy" analysis is reversible error.

ARGUMENT 2

THE COURTS BELOW ERRED IN HOLDING THAT PETITIONERS HAD SUFFICIENT DISPOSABLE INCOME TO REPAY A SUBSTANTIAL PORTION OF THEIR UNSECURED CONSUMER DEBT.

Having reached an erroneous legal conclusion (that Petitioners' ERISA-qualified pension payments constituted "disposable income" distributable to creditors in the context of a "hypothetical Chapter 13 analysis"), the courts below looked to the parties' stipulation, and concluded that Petitioners had sufficient disposable income to repay a substantial portion of their unsecured debt. *See,* App. B at 11a-12a; App. A pp. 4a-5a.

Had the courts below reached ***the correct*** legal conclusion (i.e., that the Petitioners' ERISA-qualified pension payments ***do not*** constitute "disposable income" distributable to creditors in the context of a "hypothetical Chapter 13 analysis"), they would have been compelled by the parties' stipulation to find that the Petitioners lacked the ability to repay a substantial portion of their unsecured debt. App. B at 7a - 8a. The lower courts' failure to hold that the Petitioners

lacked the ability to repay a substantial portion of their unsecured debt is reversible error, directly attributable to their erroneous legal and policy analysis as set forth above.

ARGUMENT 3

THE COURTS BELOW ERRED IN SUSTAINING THE UNITED STATES TRUSTEE'S MOTION TO DISMISS THIS NO-ASSET CHAPTER 7 CASE PURSUANT TO 11 U.S.C. § 707 (b) AS A "SUBSTANTIAL ABUSE" OF THE BANKRUPTCY CODE.

Erroneous legal analysis and "policy" considerations led the lower courts to the incorrect conclusion that ERISA-qualified benefits are "disposable income" in a "hypothetical Chapter 13" case, and ultimately to the incorrect conclusion that the Petitioners had the ability to repay a substantial portion of their unsecured debt through a "hypothetical Chapter 13 plan." App. B, pp. 11a-12a; App. A pp. 4a-5a. The erroneous analysis employed by the courts below culminated in an erroneous holding, affirmed by the Eighth Circuit Court of Appeals, that the Petitioners' ability to repay a substantial portion of their unsecured debt warranted dismissal of Petitioners' no-asset Chapter 7 bankruptcy case pursuant to 11 U.S.C. § 707(b). App. B pp. 11a-12a; App. A pp. 4a-51. In short: The dismissal of Petitioners' no-asset Chapter 7 case as a "substantial abuse" of the Bankruptcy Code constitutes reversible error, which must be corrected. This Court must therefore issue the Writ of Certiorari requested by the Petitioners.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Otherwise, this Court will suffer (a) the constructive reversal of *Patterson* and *Guidry* by inferior federal courts, and (b) continued confusion among the federal courts as to the proper treatment of ERISA-qualified plan benefits in resolving motions to dismiss pensioners' Chapter 7 bankruptcy cases under 11 U.S.C. § 707(b).

The Court of Appeals' decision in this case is wholly inconsistent with this Court's holdings in *Guidry* and *Patterson* as to the scope of the anti-alienation provisions contained in all ERISA-qualified plans. The "hypothetical Chapter 13 plan" analysis employed by the courts below in sustaining the dismissal of the Petitioners' no-asset Chapter 7 bankruptcy case effectively, and erroneously, created a "hypothetical Chapter 13 analysis exception" to ERISA's anti-alienation provision. This Court has clearly rejected any such exception to ERISA's anti-alienation provisions, and has long sought to ensure "that the treatment of pension benefits will not vary based on the beneficiary's bankruptcy status." *Patterson*, 504 U.S. at 764.

The use of "hypothetical" facts and "hypothetical" Chapter 13 proceedings to defeat the Petitioners' real world request for relief under Chapter 7 of the Bankruptcy Code is a seriously flawed analytical process, with immediate and adverse impact upon the goal of ERISA long recognized by this Court: Ensuring that "if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it." *Patterson*, at 764-65, *quoting Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). Supreme Court guidance on the

narrow issue presented here is critical and essential to that goal. This Court should seize the opportunity to provide all federal courts faced with the questioned presented here "a neutral and rational interpretive methodology . . . so that the symbol of our profession may remain the scales, not the seesaw." *Patterson,* at 766-67 (Scalia, J., concurring).

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed May 5, 2000]

No. 99-3831

In re: Gerald E. Taylor; Betty Taylor, *Debtors.*	)
Gerald E. Taylor; Betty A. Taylor, *Appellants,*	)
v.	)
United States of America, *Appellee.*	)

Appeal from the United States District Court for the Southern District of Iowa.

OPINION

Before BOWMAN and HANSEN, Circuit Judges, and CARMAN,[1] Judge.

HANSEN, Circuit Judge.

Gerald E. Taylor and Betty A. Taylor appeal the district court's[2] decision affirming the bankruptcy court's[3] dismissal of their bankruptcy petition. The bankruptcy court determined that the Taylors' petition constitutes a substantial abuse of the bankruptcy system because the Taylors are able to pay their creditors. See 11 U.S.C. § 707(b) (authorizing dismissal upon a finding of substantial abuse of the bankruptcy system); In re Walton, 866 F.2d 981,982 (8th Cir. 1989) (holding that dismissal of a bankruptcy petition pursuant to § 707(b) is appropriate when a reviewing court finds that debtors possess the ability to pay their creditors). In reaching its conclusion regarding the Taylors' ability to pay their creditors, the bankruptcy court included income from Gerald Taylor's ERISA[4]-qualified pension in its calculation of

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[1] The Honorable Gregory W. Carman, Chief Judge, United States Court of International Trade, sitting by designation.

[2] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

[3] The Honorable Lee M. Jackwig, United States Bankruptcy Judge for the Southern District of Iowa.

[4] The Employee Retirement Income Security Act of 1974 (codified as amended at 29 U.S.C. §§ 1001-1461 (1994 & Supp. III

the Taylors' disposable income. Acting as an appellate court, the district court reviewed the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. See In re Fairfield Pagosa, Inc., 97 F.3d 247, 252 (8th Cir. 1996) (citations omitted). After conducting its review, the district court upheld the bankruptcy court's findings and conclusions. (See Dist. Ct. Ord. at 5.) We conduct a second, independent review of the bankruptcy court's decision applying the same standards as the district court. See Fairfield Pagosa, 97 F.3d at 252.

The question of whether a bankruptcy court may include an ERISA-qualified pension in its calculation of a petitioner's disposable income is an issue of first impression in this circuit. In In re Koch, 109 F.3d 1285, 1287-90 (8th Cir. 1997), we held that a debtor's disability payments could be considered in the disposable income calculus even though the payments were classified as exempt from creditors under South Dakota state law and, therefore, exempt from creditors under Chapter 7 of the United States Bankruptcy Code. We concluded that the relevant inquiry is not whether the payments are exempt from creditors in a Chapter 7 proceeding but whether the challenged payments would constitute income in a hypothetical proceeding under Chapter 13 of the United States Bankruptcy Code. See id. at 1288-89.

Chapter 13 affords "an individual with regular income" the option of preserving their "pre-petition assets through a three- to five-year plan funded primarily" with that

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1997) and in scattered sections of Title 26 U.S.C.).

individual's regular income. Id. at 1288 (citing 11 U.S.C. § 109(e)). If, however, an unsecured creditor or trustee objects to the confirmation of the Chapter 13 plan, the debtor can obtain Chapter 13 relief only if the plan "provides that all of the debtor's projected disposable income to be received [during the three-year plan] will be applied to make payments under the plan." Id. at 1289 (quoting 11 U.S.C. § 1325(b)(1)(B)). Disposable income is income received by the debtor that is not reasonably necessary for support of the debtor, the debtor's dependants, or the debtor's business. Id.; 11 U.S.C. § 1325(b)(2)(A) and (B). As the bankruptcy court determined, Gerald Taylor's ERISA-qualified pension is not reasonably necessary to support the Taylors. Hence, it is disposable income as defined in § 1325(b)(2)(A) and (B).

The Taylors argue that ERISA's anti-alienation provisions, see 29 U.S.C. § 1056(d)(1), exempts the pension plan from the disposable income calculation. The Taylors base their argument on Patterson v. Shumate, 504 U.S. 753 (1992). In Patterson, the Supreme Court held that ERISA's anti-alienation provision constituted an enforceable transfer restriction in a proceeding instituted under 11 U.S.C. § 541 (c)(2). See 504 U.S. at 760. The Taylors contend that pursuant to the Patterson Court's interpretation of ERISA's anti-alienation provision, a bankruptcy court may not include an ERISA-qualified pension in its calculation of disposable income. The Taylors' reliance on Patterson is misplaced.

The fact that a pension is exempt from the reach of creditors does not preclude a bankruptcy court from finding that the pension is also disposable income for purposes of Chapter 13. The question of whether income from a pension is exempt from creditors is a wholly independent inquiry from

the question of whether the pension income is reasonably necessary to support the debtor. See In re Morse, 164 B.R. 651, 656 (Bankr. E. D. Wash. 1994). The latter question is the pertinent inquiry for purposes of Chapter 13. See Koch, 109 F.3d at 1289. In regard to the former question, we note that nothing in the language of Chapter 13 prevents the funding of a Chapter 13 plan with exempt income. See id.; In re Hagel, 184 B.R. 793,798 (B.A.P. 9th Cir. 1995). Hence, the question of whether a pension plan is exempt or otherwise restricted by a federal anti-alienation provision is irrelevant in a Chapter 13 context. Accordingly, the bankruptcy court committed no error when it included Gerald Taylor's ERISA-qualified pension in its calculation of the Taylors' disposable income and dismissed the Taylors' bankruptcy petition pursuant to § 707(b). We, therefore, affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

[Filed September 15, 1999]

No. 98-00612-CJ
4-98-CV-90353

In re:	)	
	)	
GERALD E. TAYLOR and	)	Chapter 7
BETTY A. TAYLOR,	)	98-00612-CJ
Debtors.	)	
	)	
GERALD E. TAYLOR and	)	
BETTY A. TAYLOR,	)	4-98-CV-90353
Appellants,	)	
	)	
v.	)	
	)	
UNITED STATES TRUSTEE,	)	
Appellee.	)	
	)	

ORDER ON APPEAL FROM UNITED STATES BANKRUPTCY COURT

Gerald E. Taylor and Betty A. Taylor ("Mr. Taylor" and "Mrs. Taylor," respectively, "the Taylors," collectively) appeal from Chief Bankruptcy Judge Lee M. Jackwig's May

7, 1998 final Order granting the United States Trustee's Motion to Dismiss the Taylors' Chapter 7 bankruptcy case as a "substantial abuse" of the Bankruptcy Code pursuant to 11 U.S.C. § 707(b). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a)(1).

I. Legal Standard

When a bankruptcy court judgment is appealed to a district court, the district court acts as an appellate court and reviews the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*. *See In re Fairfield Pagosa, Inc.*, 97 F.3d 247, 252 (8th Cir. 1996) (citing *Wegner v. Grunewaldt,* 821 F.2d 1317, 1320 (8th Cir. 1987)). In this case the parties stipulated to the facts presented to the bankruptcy court. Therefore, the only issue before this Court is the single legal issue that was before Judge Jackwig: whether payments from Mr. Taylor's pension plan should be included as "disposable income" pursuant to an analysis under 11 U.S.C. § 707(b).

II. Facts

The Taylors filed their voluntary Chapter 7 Petition on February 18, 1998. Their amended Schedule J indicates reasonable monthly expenditures of $2,799.64, exclusive of credit card payments. Their amended Schedule I indicates net monthly income of $4,603.48, consisting of income from employment and pension plans. Specifically at issue is the income from Mr. Taylor's Deere & Company pension, a qualified plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). Per the parties' stipulation, if the $1,770 per month received from the plan were included

as disposable income distributable to creditors under the "hypothetical Chapter 13 plan analysis pursuant to 11 U.S.C. § 707(b), then: (1) the Taylors' monthly income would exceed their reasonable monthly expenses by $1,803.84 per month; (2) the $1,803.84 monthly surplus would generate a 36-month dividend to unsecured creditors of $64,938.24, and a 60-month dividend of $108,230.40, a 59.91% and 99.84% payout respectively based on the Taylors' $108,400 total unsecured debt; and (3) the Taylors would have the ability to repay a substantial portion of their unsecured consumer debt.

Conversely, the parties stipulated that if the $1,770 per month received from Mr. Taylors' pension plan were not included as disposable income: (1) the Taylors' monthly income would exceed their reasonable monthly expenses by $33.84 per month; (2) the $33.84 monthly surplus would generate a 36-month dividend to unsecured creditors of $1,218.24, and a 60-month dividend of $2,030.40, a 1.12% and 1.87% payout respectively; and (3) the Taylors would not have the ability to repay a substantial portion of their unsecured consumer debt. Judge Jackwig found that the income from the ERISA-qualified pension plan was includable as disposable income, and dismissed the Taylors' case. This Court reviews the conclusion of the bankruptcy court *de novo*.

III. Analysis

Pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 353, ("the Act"), Congress added subsection b to section 707 of the Bankruptcy Code which provides:

> (b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b). The Eighth Circuit has commented, "[w]ith the enactment of [the Act], debtors no longer have unfettered access to voluntary Chapter 7 relief." *In re Walton,* 866 F.2d 981,982 (8th Cir. 1989). Section 707(b) is "aimed primarily at stemming the use of Chapter 7 relief by unneedy debtors." *Id.* at 983 (citing S. Rep. No. 65, 98th Cong., 1st Sess. 3 (1983)). While the term "substantial abuse" is not defined within the section or elsewhere in the Bankruptcy Code, the focus of this flexible standard is the debtor's ability to pay debts owed creditors out of future income. *See id; In re Koch,* 109 F.3d 1285, 1288 (8th Cir. 1997) (holding that substantial ability to pay creditors by itself warrants dismissal for substantial abuse).

The debtor's ability to repay creditors for § 707(b) purposes is measured by evaluating the debtors' financial condition under a hypothetical Chapter 13 proceeding. *See Koch,* 109 F.3d at 1288; *Walton,* 866 F.2d at 984-85. In funding a plan under Chapter 13, courts are guided by § 1325(b): "all of the debtor's projected disposable income to be received [during the duration of the plan] will be applied to make payments under the plan." *Koch,* 109 F.3d at 1289 (quoting 11 U.S.C. § 1325(b)(1)(B)). "Disposable income"

is defined as income not necessary to support a debtor, a debtor's dependents, or a debtor's business. *See* 11 U.S.C. § 1325(b)(2). The question is whether Mr. Taylor's pension income can be considered when determining the amount of disposable income in a hypothetical Chapter 13 analysis, and thus as part of the Taylors' ability to pay under Chapter 7.

The Taylors argue that the anti-alienation provision contained in ERISA § 206(d)(1) prevents any income from the plan from being considered when determining disposable income. The provision reads "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). The Taylors rely heavily on the Supreme Court's interpretation of the ERISA anti-alienation clause in *Patterson v. Shumate,* 504 U.S. 753 (1992). The *Patterson* Court found that the anti-alienation provision of § 206(d)(1) constituted a restriction on transfer enforceable under "applicable nonbankruptcy law" as provided in 11 U.S.C. § 541(c)(2) of the Bankruptcy Code, and accordingly, a debtor could exclude his interest in such a plan from the property of the bankruptcy estate. *See Patterson,* 504 U.S. at 755. However, this Court does not find *Patterson* dispositive of the instant case. Although pension benefits may be exempt property, a debtor's ability to claim an exemption is an independent issue from whether the debtor has the ability to repay his or her debts. *See Koch,* 109 F.3d at 1289 (holding that exempt income should be included in hypothetical Chapter 13 disposable income calculation under Chapter 7 substantial abuse analysis); *In re Hegel,* 184 B.R. 793,796 (B.A.P. 9th Cir. 1995) (citing *In re Hegel,* 171 B.R. 686, 689 (Bankr. D. Mont. 1994)).

The Hegel court addressed whether social security payments, also subject to an anti-alienation clause[1], could be considered in calculating a debtor's disposable income under Chapter 13. The court noted that because section § 1325(b) does not qualify income by reference to its exempt status, income from exempt property should be included in the disposable income calculation. *See Hagel,* 184 B.R. at 796 (citing *In re Morse,* 164 B.R. 651, 655 (Bankr. E. Wash. 1994); *In re Schnabel*, 153 B.R. 809, 815 (Bankr. N.D. Ill, 1993)); *accord Koch,* 109 F.3d at 1289 (cases cited therein). The *Hagel* court noted that 11 U.S.C. § 1322(b) specifically allows a debtor to make payments from exempt property, and notes that the inclusion of payments from exempt property for the purpose of calculating ability to pay is different from the inclusion of exempt property in assets to be administered by the trustee[2]. *See Hagel,* 184 B.R. at 798.

The *Koch* and *Hagel* cases are determinative of the outcome of this case. The Court, therefore, finds that the income from Mr. Taylor's pension was properly included in the disposable income calculation, leaving the Taylors with

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[1] That anti-alienation provision reads: "[t]he right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable . . . shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a).

[2] The inclusion of income from excluded property in the disposable income calculation does not conflict with the policy objectives of the anti-alienation provision. *See In re Hagel,* 184 B.R. at 797 (social security).

substantial ability to pay their creditors, which warrants a dismissal of their Chapter 7 petition for substantial abuse. The Bankruptcy Court's decision is AFFIRMED.

IT IS SO ORDERED.

Dated this 10th day of September, 1999.

/s/_____
ROBERT W. PRATT
U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 6 2000

No. 00-192

In the Supreme Court of the United States

RUBEN HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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13 pp

QUESTION PRESENTED

Whether the district court erred in sentencing petitioner to life imprisonment for drug offenses in the absence of jury findings on the quantity of drugs involved in petitioner's offenses or petitioner's leadership role in those offenses.

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In the Supreme Court of the United States

No. 00-192

RUBEN HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 213 F.3d 323.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2000. The petition for a writ of certiorari was filed on July 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Northern District of Illinois, petitioner was convicted of one count of conspiracy to possess cocaine and cocaine base with intent to distribute them, in violation of 21 U.S.C. 846, four counts of distributing cocaine or cocaine base, in

violation of 21 U.S.C. 841(a)(1), and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). On January 13, 1999, the district court imposed a sentence of life imprisonment on the drug counts and a concurrent sentence of ten years' imprisonment and a $10,000 fine on the firearm count. The court of appeals affirmed the conviction and sentence. See Pet. App. A1-A2.

1. From 1989 until June 26, 1997, petitioner operated a string of crack houses in Joliet-Lockport, Illinois. Pet. App. A2-A5. Petitioner personally sold drugs to an informant working with police officers four times between January and June of 1997. *Id.* at A4. On June 26, 1997, petitioner was found in possession of two handguns. *Id.* at A5. At petitioner's trial, the jury found him guilty on all of the counts with which he was charged. *Id.* at A6. The jury was not instructed that it had to find that petitioner possessed any particular quantity of drugs in order to convict him on the drug counts.

At sentencing, the district court found that petitioner was responsible for at least 1.5 kilograms of cocaine base and played a leadership role in the conspiracy. Pet. App. A22, A24-A25. Petitioner had previously been convicted of the state felony drug offense of possession of a controlled substance with intent to deliver it. Presentence Investigation Report ¶ 43. Based on those findings, the Sentencing Guidelines indicated that petitioner should be sentenced to life imprisonment. See *id.* ¶¶ 28, 31, 43, 90. The district court imposed that sentence.

2. On appeal, petitioner argued, *inter alia*, that he did not have a sufficient opportunity to discuss the presentence report with his attorney before sentencing, that the district court improperly failed to resolve

alleged contradictions in the evidence before making its drug quantity findings, and that the evidence was insufficient to find that petitioner had a leadership role in the offense. See Pet. C.A. Br. 34-49. The court of appeals rejected all of petitioner's contentions and affirmed his conviction and sentence. See Pet. App. A2. The court held that the district court's drug quantity findings were "very conservative" and supported by "the overwhelming weight of the testimony presented at trial." *Id.* at A23-A24.

ARGUMENT

1. Petitioner argues (Pet. 5-9) that his sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

a. Petitioner mistakenly states (Pet. 6-7) that his sentence, unlike that of the defendant in *Apprendi*, did not exceed the "normal statutory maximum." Petitioner's drug offenses were subject to the graduated penalties set forth in 21 U.S.C. 841(b) (1994 & Supp. IV 1998). Under that subsection, a defendant with a prior felony drug conviction can be sentenced to life in prison if his offense involves 50 grams or more of cocaine base. See 21 U.S.C. 841(b)(1)(A)(iii). Where no drug quantity is found, however, the maximum term of imprisonment applicable to a defendant with a prior drug felony conviction is 30 years. See 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998). The statutory maximum term of imprisonment applicable to petitioner on each count

therefore was 30 years.[1] Petitioner, however, received a sentence of life imprisonment. That sentence was permissible only by virtue of a fact (involvement in the offense of more than five grams of cocaine base) that was not found by the jury. Imposition of a sentence of life imprisonment was thus error under this Court's decision in *Apprendi*.

b. Petitioner also maintains that the district court violated *Apprendi* by selecting a sentence within the statutory range based on facts not found by the jury, namely the drug quantities and his leadership role. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that, so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct *the judge* * * * to determine" type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind.").

Apprendi did not hold otherwise. See *Apprendi*, 120 S. Ct. at 2366 n.21 ("The Guidelines are, of course, not

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[1] The district court would have statutory authority to run those terms consecutively, for a cumulative maximum term of 150 years' imprisonment. See 18 U.S.C. 3584. The Guidelines also address the circumstances under which sentences on multiple counts should be run consecutively to achieve the total punishment determined under the Guidelines. Guidelines § 5G1.2. The constitutionality of a sentence under *Apprendi*, however, turns on whether the sentence on a particular count exceeds the prescribed statutory maximum. 120 S. Ct. at 2354.

before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515). The Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). District courts have the power to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because specific offense characteristics and sentencing adjustments under the Sentencing Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Sentencing Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").

c. Petitioner did not raise his constitutional claim in either court below, and that claim may therefore be considered only under a plain-error standard. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997). The error in imposing a life sentence based on quantity findings made by the court at sentencing was "plain," in that it was "clear" or "obvious" after the

decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"). Petitioner is not entitled to relief, however, unless he can also demonstrate both that the error "affect[ed] substantial rights" and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467.

Petitioner will be hard pressed to meet that standard, for two reasons. First, as the court of appeals noted, "the overwhelming weight of the testimony presented at trial amply supports the district court's finding that [petitioner] was responsible for the very conservative figure of 1.5 kilograms of cocaine base." Pet. App. A23-A24. That is 30 times the amount required to subject petitioner to a maximum sentence of life imprisonment under Section 841(b)(1)(A) (1994 & Supp. IV 1998). See *Johnson*, 520 U.S. at 470 (error in failing to submit element to the jury did not affect the fairness, integrity, or public reputation of judicial proceedings where the evidence on the element was overwhelming and uncontested). Second, there is no practical difference between defendant's actual sentence of life imprisonment and the cumulative statutory maximum of 150 years' imprisonment to which he could have been sentenced. See note 1, *supra*. Nevertheless, it would be appropriate to allow petitioner an opportunity to make the requisite showings to the court of appeals in the first instance, and, accordingly, the case should be remanded to the court of appeals for further consideration.

2. Although petitioner includes only the *Apprendi* issue in his questions presented, see Pet. i, he appears to argue (Pet. 5-6 n.2) that review should also be

granted to determine "whether a preponderance standard should apply when so-called sentencing factors significantly increase a sentence." The preponderance of the evidence standard has long been applied to sentencing factors, both by this Court, see *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), and by the courts of appeals. See note 2, *infra*. This Court has noted the existence of a divergence of opinion among the courts of appeals on whether, in "extreme" circumstances, due process might require a higher standard than preponderance of the evidence in making findings under the Sentencing Guidelines. See *Watts*, 519 U.S. at 156 & n.2; accord *Almendarez-Torres* v. *United States*, 523 U.S. 224, 247-248 (1998). The United States recently filed a petition for a writ of certiorari seeking resolution of that issue. *United States* v. *Reed*, No. 99-1096 (filed Dec. 29, 1999) (seeking review of *United States* v. *Hopper*, 177 F.3d 824 (9th Cir. 1999), cert. denied, 120 S. Ct. 1179 (2000)).[2] In *Reed*, the court of appeals remanded a case for resentencing, based on the court of appeals' holding that certain sentencing factors had to

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[2] We explained in our petition in *Reed* that there is a conflict between the decision of the Ninth Circuit in that case requiring proof (in certain circumstances) of a sentencing factor by clear and convincing evidence and decisions of the Tenth, First, and Fourth Circuits. See 99-1096 Pet. at 14-16 (citing *United States* v. *Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), cert. denied, 511 U.S. 1020 (1994); *United States* v. *Lombard*, 102 F.3d 1 (1st Cir. 1996), cert. denied, 520 U.S. 1266 (1997); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1239 (4th Cir.), cert. denied, 493 U.S. 943 (1989)). We are aware of no appellate decision outside the Ninth Circuit that has required proof of a sentencing factor (as opposed to a ground for a substantial departure) by more than a preponderance of the evidence. See also *United States* v. *Mezas de Jesus*, 217 F.3d 638 (9th Cir. 2000); *United States* v. *Valensia*, No. 99-10170, 2000 WL 1051865, at *3-*9 (9th Cir. Aug. 1, 2000).

be proven by clear and convincing evidence because of their effect on the defendant's sentence. When the district court reimposed the same sentence on remand after finding the sentencing factors under the court of appeals' standard, the certiorari petition was dismissed on the government's motion. *United States* v. *Reed*, 120 S. Ct. 1578 (2000).

This case is not a suitable vehicle for resolving any disagreement among the circuits on the burden of proof at sentencing. Petitioner apparently now objects to the use of the preponderance standard in determining the quantity of drugs attributable to him and his leadership role in the offense. Pet. 5. In the court of appeals, however, petitioner conceded that the preponderance standard governs drug quantity calculations, see Pet. C.A. Br. 40 ("The government shoulders a preponderance burden of proving drug quantity."), and he did not argue that any other standard governs the finding that he was an organizer or leader of a criminal activity. Accordingly, the court of appeals did not address the question whether any standard higher than preponderance of the evidence should have been applied in sentencing petitioner under the Guidelines. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation omitted); see *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, as the court of appeals noted, the "overwhelming weight of the testimony presented at trial amply supports the district court's finding" regarding drug quantity, Pet. App. A23-A24, and "[t]he record clearly supports that [petitioner] was the leader of an extensive drug operation with numerous employees and participants," *id.* at A25. In those circum-

stances, there is no reason to conclude that resolution of the standard of proof issue would have any effect on petitioner's sentence. Further review to determine the standard applicable to factual findings at sentencing is accordingly unwarranted.

CONCLUSION

With respect to petitioner's claim that the district court erred by sentencing him in accordance with 21 U.S.C. 841(b)(1)(A) (1994 & Supp. IV 1998), in the absence of a jury finding concerning the quantity of drugs involved in his offenses, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). In all other respects, the petition should be denied.

Respectfully submitted.

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